

In The Matter Of:)
Effects of Communications Towers) Docket No. 03-187
On Migratory Birds)

TABLE OF CONTENTS

	<u>Page</u>
Identification Of The Parties	2
Substantive Comments	
1. Thank You, FCC	3
2. A Notice Of Inquiry Is The Right Place To Start	3
3. While More Research <i>Is</i> Needed, Let’s Not Make The Research Phase Last Forever	6
4. When And If The Commission Acts To Develop New Regulations, To Reduce Or Eliminate Migratory Bird Collisions With Communications Towers, The FCC Should Concurrently Address Certain Other Pending “Public Interest” Issues As Well	8
Needed: Forums For Dialogues -- Or, Rather, “Multilogues”	17
Conclusions	18

Don Schellhardt, Esquire and **Nickolaus E. Leggett** hereby submit these Joint Written Comments in FCC Docket 03-187. This Docket is a Notice Of Inquiry to explore reports of migratory bird collisions with communications towers -- and to develop protective measures if a serious problem is determined to exist.

Don Schellhardt is a writer and attorney with 28 years of Government Relations experience, including 9 years as a government employee (in the Legislative, Executive and Judicial Branches, at both the State and Federal levels) and 17 years as an advocate before government (again, in all 3 Branches, at both the State and Federal levels).

Don Schellhardt is now in solo practice as a lawyer/lobbyist and speechwriter. At present, his most prominent client is THE AMHERST ALLIANCE: a Net-based, nationwide citizens' advocacy group for media reform in general and Low Power Radio in particular. Don co-founded Amherst in 1998 and currently manages it as President. In these Written Comments, however, he speaks *only* for himself.

Nickolaus E. Leggett is an Amateur Radio operator (Extra Class licensee – call sign N3NL), inventor (U.S. Patents # 3,280,929 and 3,280,930, with one electronics invention patent pending), and a certified electronics technician (ISCET and NARTE). He also has a Master of Arts degree in Political Science from the Johns Hopkins University (May 1970).

Don Schellhardt has not commented previously in FCC Docket 03-187. However, Nick Leggett has filed individual Written Comments in this Docket on October 1, 2003.

We are motivated by our shared desire to find a humane, equitable and workable point of balance between: (a) the need to maintain effective and reliable communications services for vital institutions (including “first responders” to emergencies) and members of the general public; and (b) the need to preserve, and where necessary restore, a healthy and beautiful natural environment.

Substantive Comments

Jointly, we raise the following points:

1. *Thank You, FCC:* We commend the Federal Communications Commission for initiating these proceedings. Reports of bird bird collisions with communications towers have been frequent enough to suggest that a serious loss of wildlife *may* be occurring. It is time for a serious investigation of these reports *and* a serious consideration of potential mandates for effective protective measures.

2. *A Notice Of Inquiry Is The Right Place To Start.* We share the concerns of many regarding reports of bird collisions with communications towers. However, we agree with the FCC that a Notice Of Inquiry (NOI) is the best place to begin deliberations. Frankly, so far as we can tell, the FCC does not yet know enough to draft well-grounded regulations, either final or proposed.

Specifically:

(a) *We need to know more about the actual extent of migratory bird collisions with communications towers.* We have seen estimates that literally range from *hundreds* of birds killed each year to year to *millions* of birds killed each year. While even one bird killed per year is one too many, it will be difficult or impossible for the FCC to develop, and then justify, protective measures -- particularly if they are *expensive* protective measures -- so long as there is such an extraordinary level of uncertainty regarding the scope of the problem that must be solved.

(b) *We need to know more about what kind of protective measures will work -- preferably at a reasonable cost, and definitely without making other environmental problems worse.*

Our involvement with the promotion of Low Power FM Radio and Low Power AM Radio, as well as our advocacy of media reform in general, have brought us into sustained contact with some members of the established broadcasting community.

From our communications with these people, we have gained the distinct impression that most broadcasting personnel truly *do not know*, at this point, which of the possible protective

measures (if any) will work at all -- let alone which will work at a reasonable cost. Unfortunately, more research, or at least much better sharing of the available information, appears to be necessary for the development of effective but affordable responses. In addition, while it is *important* to keep costs to the minimum level that is needed to “get the job done”, it is *essential* to “screen out” protective measures that would reduce migratory bird collisions but make *other* environmental problems worse. As one example, illuminating communications towers at night might reduce the number of migratory bird collisions, but it would presumably increase visual pollution of the night sky -- much to the chagrin of astronomers and others -- and could increase aesthetic objections to communications towers by some of their human neighbors. Conversely, mandatory placement of “warning whistles” on communications towers, particularly *if* they can be pitched to be heard by birds but not by humans, might reduce the number of bird collisions, without creating and/or aggravating other problems in the process.

3. *While more research is needed, let's not make the research phase last forever.* It does not require much political sophistication to know that “studying a problem” is often the first step in ignoring it. We hope, and believe, that the FCC is seriously committed to *action* on migratory bird collisions -- if the problem is even partly as serious as some concerned groups and individuals have claimed.

Should a serious problem be documented, reasonable corrective actions by the Commission are *not* optional. Instead, the FCC will be legally obligated to act.

(a) Treaty obligations are applicable. The United States is a party to international agreements which affirmatively require the protection of migratory birds.

(b) Statutory obligations are applicable. Among other potentially applicable statutes, the Endangered Species Act requires Federal Government action to protect *any* endangered species, whether migratory or not *and* whether avian or not. The National Environmental Policy Act (NEPA) requires the preparation of an Environmental Assessment (EA), and in

some cases the preparation of a much more comprehensive Environmental Impact Statement (EIS), whenever there is *any* significant risk of *any* significant impact on the environment. When and if a negative environmental impact of significant scale, which can include migratory bird collisions, is found, the EIS *must* include detailed consideration of protective measures, designed to mitigate or eliminate that impact.

(c) The legal rights of Native Americans, as guaranteed by treaties and/or statutes, are applicable. In this regard, we incorporate by reference the October 27, 2003 Written Comments of the Chickasaw Nation. Writing from Ada, Oklahoma, this tribal nation stresses that many different birds are considered “culturally significant” by the Chickasaws. The same Written Comments request a vigorous investigation of the extent of bird collisions on Chickasaw lands.

We also incorporate by reference the October 31, 2003 Written Comments of Alice Harwood, Acting Regional Director of the Great Plains Regional Office of the U.S. Department of the Interior’s Bureau of Indian Affairs (U.S. DOI/BIA).

Writing from her office in Aberdeen, South Dakota, Ms.

Harwood expresses the BIA's support for further research and action by the FCC.

4. *When and if the Commission acts to develop new regulations, to reduce or eliminate migratory bird collisions with communications towers, the FCC should address concurrently certain other pending "public interest" issues as well.* We are realistic enough to realize that *some* tower-building companies would rather not have to worry about migratory bird protection at all. Given the consistent under-funding of the FCC by Congress, we suspect that some overworked FCC staffers may feel the same way. Nevertheless, given the Commission's multiple legal obligations to act if sufficient evidence accumulates (as discussed in Section 3 of these Joint Written Comments), there is clearly a substantial probability of *some* new regulations to protect migratory birds. Given this prospect, the question becomes whether *other* simmering "public interest" concerns should be addressed at the same time.

We believe that *all* affected parties -- tower-building companies and/or broadcasters and/or other terrestrial communications corporations, FCC staffers and Commissioners, environmental groups and other concerned citizens -- will be required to invest *less* total time, energy and money if new regulations for migratory bird protection are developed *in concert with* other new regulations to address certain other unresolved “public interest” concerns.

We urge *concurrent action* on the following additional areas of concern:

(a) *Wildlife other than migratory birds.* Since ornithologists, ecologists and other wildlife experts will have to be consulted in order to determine the extent of migratory bird collisions, and also to develop possible protective measures, why bring them all together again *a second* time in order to deal with *other* wildlife?

As we noted in Section 3 of these Joint Written Comments, the Commission’s legal obligations are *not* limited to *migratory* birds alone -- or even to birds in general.

Under the Endangered Species Act, NEPA and/or other legally binding documents, the Commission *must* address *any* significant environmental impact from tower design and/or construction, including *any* significant risk of *any* significant loss of *any* wildlife. This could easily include, for example, wildlife on the ground that is displaced from its habitat by tower construction or that is subjected to Radio Frequency (RF) exposure at levels that would clearly be considered dangerous if humans were involved.

Given the almost inevitable legal necessity for *eventually* assessing (and perhaps, in some cases, remediating) the impact of communications towers on *all* wildlife, why not utilize the necessary intellectual, managerial and financial resources at *maximum efficiency* -- by collecting them and applying them *comprehensively*, and perhaps even synergistically, instead of piecemeal?

(b) *Radio Frequency (RF) exposure.* A vehicle for regulatory deliberations on RF exposure is already on file with the FCC.

On September 25, 2001, EMR NETWORK of Vermont filed with the FCC a Petition For Notice Of Inquiry on the adequacy of current health and safety limits for

-- *and also* the feasibility of possible measures to reduce -- electromagnetic radiation (EMR) emissions from various FCC-regulated electronics equipment.

Included in the proposed NOI would be radio equipment, and other EMR-emitting equipment, that is placed on communications towers.

We incorporate the text of this Petition, and of all related documents that the FCC may possess, by reference.

It is our understanding that EMR NETWORK's Petition was denied by FCC *staff*, without ever being Docketed for public comment, in December of 2001. It is our further understanding that EMR NETWORK's subsequent appeal of this staff decision has never been denied, approved or otherwise addressed by the FCC.

Technically, then, EMR NETWORK's Petition For NOI is still "pending" before the FCC. Legally, the FCC Commissioners or the FCC staff could still "discover it"

in the files -- and then Docket it, *immediately*, as a way to begin acquiring information and opinions *right now*.

We realize that the FCC has been greatly hindered, in assessing widespread public concerns about the health and safety implications of RF exposure and exposure to other EMR emissions, by the consistent refusal of the U.S. Environmental Protection Agency (U.S. EPA) to research and evaluate the current scientific evidence regarding the health effects of exposure to RF and other EMR emissions.

On more than one occasion, the FCC has noted its own lack of medical knowledge -- and then cited the U.S. EPA's refusal to act as the source of an "information vacuum" which prevents the FCC from acting as well.

However, to the best of our knowledge, the FCC has never "turned up the heat on the EPA" by formally -- and publicly -- *asking* the U.S. EPA to do its job.

Nor has the FCC made any apparent effort to obtain and evaluate the results of health and safety studies in *other* countries, where national governments have *used* those studies to justify setting much more stringent standards than the government of the United States.

(c) Protection of communications equipment against a possible Electromagnetic Pulse (EMP). Now that non-nuclear means of generating an Electromagnetic Pulse (EMP) have been developed, with the United States itself ironically “in the lead”, an EMP attack on American facilities may fall within the capabilities of several non-nuclear “rogue nations” (such as Iran) and perhaps within the capabilities of the better-funded terrorist groups as well. An EMP attack is *definitely* within the capabilities of North Korea, the People’s Republic of China and other well-armed, current or potential adversaries of our country.

For years, the U.S. military has been shielding its vital electronics equipment against a possible EMP attack. Technology has been developed to protect such equipment against an EMP of up to 50,000 volts per meter -- and

perhaps even more. The U.S. Department of Defense has found both the means *and* the motivation to act.

Meanwhile, even the most vital *civilian* electronics equipment -- including air traffic control systems, avionics computers and *emergency* communications equipment used by police officials, fire officials, Emergency Medical Teams and hospitals -- is still *completely* unshielded against an EMP of *any* intensity.

Fortunately, as is the case with EMR emissions, a vehicle for *immediate* Commission action on EMP is already on file with the FCC. It can be found in FCC Docket RM-10330.

On September 25, 2001, the co-authors of these Written Comments -- that is, Don Schellhardt, Esquire of Connecticut and Nickolaus E. Leggett of Virginia -- filed with the FCC a Petition For Rulemaking. The Petition contains the actual text of a proposed rule for phased-in shielding of the most vital civilian electronics equipment that is regulated by the FCC.

We incorporate by reference the text of this Petition and of all related documents which the FCC may possess, including those which may not have been placed in the RM-10330 Document File on the FCC's Electronic Comment Filing System (ECFS).

After this Petition *was* Docketed for public comment, as FCC Docket RM-10330, a number of public comments were received -- including supportive comments from from Dr. William Radasky, a globally renowned expert on EMP.

During June of 2002, the Petition was denied by the FCC's *staff*. We then filed a timely Petition For Reconsideration, appealing the FCC staff's denial to the full Commission.

The Petition For Reconsideration, in Docket RM-10330, has not been spotted since. Like EMR NETWORK's earlier appeal of a Petition denial by the FCC's staff, our Petition For Reconsideration has never been denied, approved or addressed in any other manner.

It has not even been acknowledged.

Legally, then, our Petition For Reconsideration is still “pending” -- which means that our Petition For *Rulemaking* is also “pending”: forgotten, perhaps, but not gone.

If it chose to do so, the full Commission could override the FCC staff’s denial at its very next meeting. A proposed rule on EMP, whether it is our own or a version crafted by the Commission, could be winging its way around The Internet by the next business day.

As with the *technology* for shielding civilian electronics equipment against an EMP attack, so it is with the options for *regulatory* action. The *means* to act are available, but can the *will* to act be found?

**Needed: Forums For Dialogues --
Or, Rather, “Multilogues”**

We close with a recommendation which is essentially *procedural*, rather than substantive, but which has clear substantive implications.

Given the business community’s uncertainties about the costs and workability of possible measures for migratory bird protection, and even about the extent of the problem itself -- compounded by the apparently low level of productive communication between environmental groups, other concerned citizens and knowledgeable scientists on the one hand, and affected corporations on the other -- development of an effective response to concerns about migratory birds is likely to require *a lot* more conversations between people with diverse perspectives, interests and agendas.

There is, in short, a clear need for extended multi-party, multi-disciplinary dialogues.

Let’s just call them “*multi-logues*”.

This need is evident even if discussions and deliberations are limited to the *relatively* narrow subject of the possible need for, and the available means to accomplish, migratory bird protection.

If, as *we* recommend, the FCC moves instead into a comprehensive Docket (or into a comprehensive set of linked Dockets) that also includes protection of *wildlife in general*, as well as RF exposure, other EMR emissions and EMP shielding, the need for multi-logues is likely to expand exponentially -- even though time, energy and money will be saved in the long run, compared to the alternative of a string of piecemeal actions.

To the extent the Commission is willing and able to host, and/or otherwise encourage, forums for constructive multi-logues between businesspeople, environmentalists, other concerned citizens and knowledgeable scientists, the odds for developing *comprehensive, “win/win” solutions* are likely to improve markedly.

Conclusions

For the reasons we have set forth herein, we urge the Commission to consider the observations we have made and adopt the recommendations we have proposed.

Respectfully submitted,

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